88-1 91

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal agency order, as interpreted and made final by a federal appellate court under exclusive statutory review procedures, must be followed by a state court in a damages action when the parties to the two proceedings are the same and the agency order explicitly requires partial preemption of the pending state law claims?

2. Whether a state court may hold an interstate natural gas pipeline contractually liable for federally-regulated curtailments of natural gas service under state law standards that conflict with a federal standard of liability that the Federal Energy Regulatory Commission and federal appellate courts have determined to be necessary to protect federal interests under the Natural Gas Act?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding that is the subject of this petition are as follows:

Louisiana Power & Light Company

Louisiana Public Service Commission

Pennzoil Company

The City of New Orleans, Louisiana

United Gas Pipe Line Company

For purposes of this Court's Rule 28.1, the petitioner herein, United Gas Pipe Line Company ("United"), is a wholly-owned subsidiary of LaSalle Energy Corp. United's affiliated companies and subsidiaries that are not wholly-owned are:

Alaskan Northwest Natural Gas Transportation Company (a partnership)

High-Island Offshore System (a partnership)

Mobile Bay Pipeline Company (a partnership)

Northern Border Pipeline Company (a partnership)

Sea Robin Pipeline Company (a joint venture)

Tarpon Transmission Company

U-T Offshore System (a partnership).

LaSalle Energy Corp. acquired United on June 30, 1987 from United Energy Resources, Inc. ("UER") and MidCon Corp. ("MidCon"). Pursuant to the pur-

chase agreement, UER and MidCon assumed liability for the payment of any judgment that ultimately might be entered in this case. UER and MidCon are wholly-owned subsidiaries of Occidental Petroleum Corporation.*

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* Subsidiaries and affiliates of Occidental Petroleum Corporation that may have publicly held securities outstanding in the United States, in addition to UER and MidCon, are as follows: IBP, Inc.; Oxy Oil and Gas USA, Inc. (formerly Cities Service Company); Occidental Chemical Corporation (formerly Diamond Shamrock Chemical Company); Natural Gas Pipeline Company of America; Kentucky Ohio Transportation Co.; Church and Dwight Co., Inc.; and Canadian Occidental Petroleum Ltd.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
A. The Federal Regulatory Proceedings	3
B. The Louisiana State Court Proceedings	7
REASONS FOR GRANTING THE WRIT	12
I. This Court Should Grant Certiorari To Protect The Integrity Of Exclusive Statutory Procedures For Review Of Federal Agency Action And To Ensure Compliance With Final Agency Action	13
II. This Court Should Grant Certiorari To Protect The Federal Interests In The Regulation Of Interstate Pipelines That Are Undermined By The Louisiana Judgment	17
A. The Federal Standard and Federal Interests	18

B. The Liability Standards Applied by the Louisiana Courts 21

CONCLUSION 27

TABLE OF AUTHORITIES

Cases **Page**

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 3

Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378 (1959) 20

California v. Southland Royalty Co., 436 U.S. 519 (1978) 23

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 18

Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 24

City of New Orleans, et al. v. United Gas Pipe Line Co., 390 F. Supp. 861 (E.D. La. 1974) 8

City of New York v. Federal Communications Commission, 108 S. Ct. 1637 (1988) 12,18

City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 12,15

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 3

Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944) 20

Federal Power Commission v. Idaho Power Co., 344 U.S. 17 (1952) 16

Federal Power Commission v. Louisiana Power & Light Co., 406 U.S. 621 (1972) .... *passim*

Fidelity Federal Savings & Loan Association v. De la Cuesta, 458 U.S. 141 (1982) 18

Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) 19

Louisiana Power & Light Co. v. United Gas Pipe Line Co., 518 So.2d 1050 (La. App. 4th Cir. 1987), *writ denied*, 523 So.2d 232 (La. 1988) .. 8

Louisiana Power & Light Co. v. United Gas Pipe Line Co., No. 579-040 (Civ. Dist. Ct., Parish of Orleans, La. Aug. 24, 1984) .... *passim*

Maryland v. Louisiana, 451 U.S. 725 (1981) 3

Table of Authorities Continued

	Page
Mississippi Power & Light Co. v. United Gas Pipe Line Co., 532 F.2d 412 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977)	8
Mississippi Power Co. v. United Gas Pipe Line Co., No. S74-258 (L) (S.D. Miss., filed Nov. 14, 1974) ...	7
Northern Natural Gas Co. v. State Corporation Commission of Kansas, 372 U.S. 84 (1963)	3,20
Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974)	19
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	23
Port of Boston Marine Terminal Association v. Rederiaktiebolaget Trans Atlantic, 400 U.S. 62 (1970)	15
Public Service Commission of New York v. Mid-Louisiana Gas Corp., 463 U.S. 319 (1983)	3
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	19
Schneidewind v. ANR Pipeline Co., 108 S. Ct. 1145 (1988)	3,18
State of Louisiana v. Federal Power Commission, 503 F.2d 844 (5th Cir. 1974)	10
Sugar Bowl Gas Co. v. Louisiana Public Service Commission, 354 So.2d 1014 (La. 1978)	15
Sunray Mid-Continental Oil Co. v. Federal Power Commission, 364 U.S. 137 (1959)	23
Texasgulf Inc. v. United Gas Pipe Line Co., 610 F. Supp. 1329 (D.D.C. 1985)	7
Texasgulf Inc. v. United Gas Pipe Line Co., 617 F. Supp. 41 (D.D.C. 1985)	8
Transcontinental Gas Pipe Line Corp. v. Federal Energy Regulatory Commission, No. 86-1358 (D.C. Cir., order entered Feb. 16, 1988), *reh'g granted in part and denied in part* (April 22, 1988)	17

Table of Authorities Continued

Page

Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi, 474 U.S. 409 (1986) 3,20

United Gas Pipe Line Co. v. Federal Energy Regulatory Commission, 824 F.2d 417 (5th Cir. 1987) .... *passim*

United States v. Shimer, 367 U.S. 374 (1961) 18

Federal Power Commission And Federal Energy Regulatory Commission Orders and Opinions

Alabama-Tennessee Natural Gas Co., et al., 56 F.P.C. 1703 and F.P.C. 2375 (1976) 4

Alabama-Tennessee Natural Gas Co., et al., 58 F.P.C. 1728 (1977) 4

Columbia Gas Transmission Corp., 42 F.E.R.C. (CCH) ¶61,021 (Jan. 19, 1983) 23

Midwestern Gas Transmission Co., 36 F.P.C. 61 (1966), *aff'd*, 388 F.2d 444 (7th Cir.), *cert. denied*, 392 U.S. 928 (1968) 20

Notice of Issuance of Proposed Policy Statement and Opportunity for Public Comments, 38 F.E.R.C. (CCH) ¶61,230 (1987) 25

Opinion No. 237, *United Gas Pipe Line Co.*, 31 F.E.R.C. (CCH) ¶61,336 (1985) .... *passim*

Opinion No. 237-A, *United Gas Pipe Line Co.*, 35 F.E.R.C. (CCH) ¶61,344 (1986) .... *passim*

Opinion No. 468, *Permian Basin Area Rate Proceeding*, 34 F.P.C. 159 (1965) 23

Opinion No. 606, *United Gas Pipe Line Co.*, 46 F.P.C. 786 (1971), *aff'd in part and remanded in part, International Paper Co. v. FPC*, 476 F.2d 121 (5th Cir. 1973) 5

Table of Authorities Continued

Page

Opinion No. 647 and 647-A, *United Gas Pipe Line Co.*, 49 F.P.C. 179 and 49 F.P.C. 1211 (1973), *vacated and remanded, State of Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974) 5,10,21

Order No. 431, 45 F.P.C. 570 (1971) 4

Order No. 436, F.E.R.C. Statutes and Regulations (CCH) ¶30,665 (1985), *vacated and remanded sub nom. Associated Gas Distributors v. FERC.*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1468 (1988) 25

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Order No. 500, F.E.R.C. Statutes and Regulations (CCH) ¶30,761 (1987), *appeal pending sub nom. American Gas Association v. FERC*, Nos. 87-1588, *et al.* (D.C. Cir.) 25

Order No. 533, 54 F.P.C. 821 (1975), *aff'd sub nom. American Pub. Gas Ass'n v. FERC*, 587 F.2d 1089 (D.C. Cir. 1978) 4

United Gas Pipe Line Co., 53 F.P.C. 1496 and 54 F.P.C. 796 (1975) 5

United Gas Pipe Line Co., 4 F.E.R.C. (CCH) ¶61,151 (1978) 8

United Gas Pipe Line Co., 20 F.E.R.C. (CCH) ¶63,070 (1982) 5

United Gas Pipe Line Co., 21 F.E.R.C. (CCH) ¶61,016 (1982), *vacated in part as moot and remanded on limited issue, Mississippi Power & Light Co. v. FERC*, 724 F.2d 1197 (5th Cir. 1984) 5

Table of Authorities Continued

Page

United States Constitution

U.S. Const. art. VI, § 2 17

Statutes, Regulations and Codes

Natural Gas Act of 1938, as amended (15 U.S.C. §717, *et seq.* (1982))

§717c 4

§717r 12,13,15

Federal Power Act (16 U.S.C. §791, *et seq.* (1982))

§825 1(b) (1982) 15

Miscellaneous

H.Rep. No. 496, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. Code, Cong. & Admin. News 8454 4

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v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FOURTH CIRCUIT

United Gas Pipe Line Company ("United") petitions for a writ of certiorari to review a judgment of the Court of Appeal, Fourth Circuit, State of Louisiana ("Louisiana Court of Appeal") holding United liable for curtailments of natural gas deliveries to one of its customers, respondent Louisiana Power & Light Company ("LP&L"), and awarding LP&L damages and prejudgment interest totaling approximately $180 million.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal (App. A at 1a) is reported at 517 So.2d 145. The order of the Louisiana Court of Appeal denying rehearing (App. B at 76a) is not reported. The opinion of the trial court (App. C at 77a) is not reported. The order of the Louisiana Supreme Court denying United's application for a writ of certiorari or review (App. D at 114a) is not reported.

JURISDICTION

The judgment of the Louisiana Court of Appeal was entered on April 30, 1987. The order of the Louisiana

Court of Appeal denying United's application for rehearing was entered on January 19, 1988. The order of the Supreme Court of Louisiana denying United's application for a writ of certiorari or review was entered on April 4, 1988. The order of this Court extending the time for filing the petition for certiorari to August 2, 1988 was entered on June 21, 1988. App. I at 214a. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal laws implicated by this petition are the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, Sec. 2, and the Natural Gas Act, Sections 1(b), 4, 7, 16, and 19(b), 15 U.S.C. §§717(b), 717c, 717f, 717o, and 717r(b) (1982). App. H at 204a.

STATEMENT

This case arises out of interrelated federal regulatory and state court proceedings that ultimately came into sharp conflict. In response to the nationwide natural gas shortage in the 1970's, the Federal Power Commission (and later its successor, the Federal Energy Regulatory Commission, both referred to herein as the "Commission") conducted extensive proceedings involving curtailments of natural gas deliveries by petitioner United, an interstate natural gas pipeline. Those proceedings culminated in a Commission ruling, affirmed by the United States Court of Appeals for the Fifth Circuit, holding that state law contract claims for damages resulting from curtailments were preempted unless a customer could prove that United's curtailments were caused by its negligence or greater misconduct. While these administrative and judicial review proceedings were being conducted, the Louisiana courts were simultaneously entertaining a contract damages action for failure to deliver gas, instituted by respondent Louisiana Power & Light Company ("LP&L"), which resulted in a $180 million judgment against United. This Louisiana judgment was based on standards of lia-

bility that differed fundamentally from the federal liability standard of negligence or greater misconduct and that ignored the federal interests protected by that standard. Petitioner seeks a writ of certiorari to correct this manifest error.

A. The Federal Regulatory Proceedings.

Under the Natural Gas Act of 1938, 15 U.S.C. §§717-717w (1982) (the "NGA"), Congress imposed a scheme of federal regulation upon the natural gas industry and designated the Commission to carry out such regulation. United is a natural gas company subject to the Commission's jurisdiction. The NGA empowers the "Commission to regulate comprehensively and effectively the transportation and sale of natural gas" in interstate commerce. *Northern Natural Gas Co. v. State Corporation Commission,* 372 U.S. 84, 91 (1963); *see also Schneidewind v. ANR Pipeline Co.,* 108 S. Ct. 1145, 1151 (1988). Some regulation of interstate pipeline activities under state law is also contemplated under the NGA, but only when such regulation neither conflicts with, nor frustrates the purposes of, legitimate federal regulatory efforts.[1]

It is within this regulatory framework that the issues in this case arose. By the early 1970's, there was a serious nationwide shortage of natural gas. This shortage, as the Court has previously explained, came about because "the regulatory structure was not working [and] . . . had led to serious production shortages." *Public Service Commission of New York v. Mid-Louisiana Gas Corp.,* 463 U.S. 319, 330 (1983). *See also Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi,* 474 U.S. 409, 420 (1986). Because of the shortage, virtually every major interstate pipeline, including United, was forced to curtail

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[1] This Court has frequently found state laws or regulations to be preempted by the NGA or by Commission action taken thereunder. *See, e.g., Schneidewind v. ANR Pipeline Co.,* 108 S.Ct. 1145 (1988); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi,* 474 U.S. 409 (1986); *Exxon Corp. v. Eagerton,* 462 U.S. 176 (1983); *Maryland v. Louisiana,* 451 U.S. 725 (1981); *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571 (1981).

deliveries to its customers during all or a substantial portion of the 1970's.[2]

These curtailments were carried out in accordance with a 1971 Commission order directing any pipeline anticipating curtailments either to file tariff sheets setting forth a plan to effectuate the Commission's policy regarding curtailments or to state that its curtailment plan currently on file would effectuate such policy. Order No. 431, 45 F.P.C. 570, 572 (1971). In response to this order, United and numerous other pipelines duly filed their curtailment plans, which were generally placed into effect subject to Commission review and approval in individual curtailment proceedings.

Shortly after the Commission's proceedings concerning United's curtailments had commenced, LP&L attacked the Commission's jurisdiction by suing in federal court to enjoin United's curtailments. This litigation ultimately resulted in *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972) *("LP&L I")*. In that case, the Court unanimously concluded that "uniform federal regulation" of curtailments was clearly desirable, that the Commission possessed and was properly exercising "broad powers" to effect such uniform regulation by requiring pipelines "to develop and submit rational curtailment arrangements" in tariffs filed under Section 4 of the NGA, 15 U.S.C. §717c (1982), and that the Commission's jurisdiction encompassed curtailments to direct sale customers such as LP&L, who purchased gas for their own

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[2] *See, e.g.*, H. Rep. No. 496, 95th Cong., 2nd Sess. 1, 90, *reprinted in 1978 U.S. Code, Cong. & Adm. News* 8454, 8534; *Alabama-Tennessee Natural Gas Co., et al.*, 56 F.P.C. 1709 and 56 F.P.C. 2375 (1976); Order No. 533, 54 F.P.C. 821, 822-23 (1975), *aff'd sub nom. American Pub. Gas Ass'n v. FERC*, 587 F.2d 1089 (D.C. Cir. 1978).

During the 1970's, the Commission conducted administrative proceedings involving the curtailment plans of some 29 interstate pipelines that accounted for the vast bulk of interstate sales of natural gas. *See, e.g., Alabama-Tennessee Natural Gas Co., et al.*, 58 F.P.C. 1728, 1733 (1977).

consumption, as well as to customers who purchase gas for resale. 406 U.S. at 636-41.

The Commission continued its proceedings on United's curtailment plans throughout the next fifteen years, and issued several orders modifying and/or affirming the curtailment priorities contained in United's tariff.[3] Additionally, between 1971 and 1975 the Commission twice issued rulings dealing with the extent of United's liability, if any, in the event of damage actions resulting from curtailments conducted in accordance with Commission procedures; in both cases the Fifth Circuit reversed and remanded for further consideration. *See generally United Gas Pipe Line Co. v. Federal Energy Regulatory Commission*, 824 F.2d 417, 421-23 (5th Cir. 1987) ("*United v. FERC*"), App. G at 166a-173a.

In response to the second of these remands, the Commission instituted an extensive evidentiary proceeding dealing with United's possible contract liability for curtailments.[4] In September 1982, an administrative law judge issued an initial decision, *United Gas Pipe Line Co.*, 20 F.E.R.C. (CCH) ¶63,070 (1982), and in June 1985, the Commission affirmed that decision in Opinion No. 237 and in Opinion No. 237-A denying rehearing. *United Gas Pipe Line Co.*, 31 F.E.R.C. (CCH) ¶61,336 (1985) (App. E at 115a), and 35 F.E.R.C. (CCH) ¶61,344 (1986) (App. F at 141a) (both opinions referred to herein as "Opinion No. 237"). In Opinion No. 237 the Commission concluded that to permit a curtailed customer to obtain contract damages for curtailments "irrespective of United's culpability" would violate the NGA's prohibition of undue discrimina-

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[3] *See, e.g., United Gas Pipe Line Co.*, 46 F.P.C. 786 (1971), *aff'd in part and remanded in part, International Paper Co. v. FPC*, 476 F.2d 121 (5th Cir. 1973); *United Gas Pipe Line Co.*, 49 F.P.C. 179 and 49 F.P.C. 1211 (1973), *vacated and remanded, State of Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974); *United Gas Pipe Line Co.*, 21 F.E.R.C. (CCH) ¶61,016 (1982), *vacated in part as moot and remanded on limited issue, Mississippi Power & Light Co. v. FERC*, 724 F.2d 1197 (5th Cir. 1984).

[4] *United Gas Pipe Line Co.*, 53 F.P.C. 1496 and 54 F.P.C. 796 (1975).

tion, App. E at 131a, and accordingly held that United's compliance with curtailment tariffs and orders would exonerate it "from breach of contract claims, provided that the curtailments were not caused by its negligence or willful misconduct . . . ." App. F at 141a.

United and several other parties, including LP&L, the Louisiana Public Service Commission and the City of New Orleans, sought review of the opinion in the Fifth Circuit.[5] The court affirmed the Commission's determination that the public interest required that negligence or willful misconduct be the basis for holding United liable in damages for its curtailments, concluding that such a standard was "rational and adequately supported by reasons and findings." *United v. FERC, supra*; App. G at 178a.

The Fifth Circuit also made clear that the Commission's ruling had established "a uniform federal standard of liability" and that this "federal standard of liability . . . preempts inconsistent state law standards." App. G at 181a, 184a n. 16 (citations omitted). The court went on to observe that "[a] state's use of the labels 'negligence' or 'fault' . . . does not necessarily satisfy the federal standard." *Id.* at 182a. "[T]o emphasize this point," the court

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[5] LP&L's wholesale sales of electricity are regulated by the Commission, while its retail sales are subject to the jurisdiction of the Louisiana Public Service Commission and the City of New Orleans. Both of these entities intervened and participated actively in support of LP&L's damage action below.

In the Fifth Circuit appeal from Opinion No. 237, LP&L, the Louisiana Public Service Commission and the City of New Orleans all sought to attack the opinion on the grounds that: (1) the Commission lacked jurisdiction to make the exculpatory standard applicable to direct sale customers; (2) the Commission's exculpatory standard was not in the public interest; and (3) the Commission erred in making the exculpatory standard retroactive to 1971. The Fifth Circuit held that these attacks were jurisdictionally barred because these parties had failed to comply with the NGA's procedural requirements for seeking review of Commission orders. App. G at 192a-203a. The Fifth Circuit nonetheless considered and rejected both the jurisdictional and public interest arguments. *Id.* at 176a-191a.

identified three essential elements of the federal standard: (1) it "impose[d] on customers claiming damages the burden to prove United's negligence or wrongful misconduct in causing the shortages"; (2) it required such negligence or wrongful misconduct to be established pursuant to an objective standard (*i.e.*, whether United acted as a reasonably prudent pipeline would have acted in the same or similar circumstances), which necessitated a finding that the curtailments were "reasonably foreseeable and avoidable" when the allegedly negligent actions took place; and (3) it required a showing that the "objectively unreasonable acts proximately caused nondelivery." *Id.* at 182a-183a. No party sought further review of the Fifth Circuit's decision.

B. The Louisiana State Court Proceedings.

While the Commission and the Fifth Circuit were addressing the appropriate federal standard of liability for United's curtailments, the Louisiana courts were adjudicating state law claims against United based on those same curtailments. LP&L, having lost in its attempt to enjoin United's curtailments, *LP&L I, supra,* proceeded to file a separate damages action in state court.[6] United unsuc-

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[6] Several other curtailment damage actions were brought against United. One suit is currently pending in which the curtailed customer seeks approximately $63 million for breach of contract and treble this amount because the curtailments allegedly violated antitrust laws. *Mississippi Power Co. v. United Gas Pipe Line Co.*, No. S74-258 (L) (S.D. Miss., filed Nov. 14, 1974). Two suits brought by other Louisiana electric utilities and/or their customers were consolidated for trial with the *LP&L* case and were subsequently settled. In another suit, a federal court bifurcated trial on liability and damages, and then conducted a trial and issued a memorandum on liability. *Texasgulf, Inc. v. United Gas Pipe Line Co.*, 610 F. Supp. 1329, 1357 (D.D.C. 1985). In its memorandum, which was issued before the Commission decided Opinion No. 237, the court held that United was exonerated only if its gas shortage could not have been prevented or overcome by "due diligence" or "due care," that United had not exercised due care in entering the contract with the customer in October 1967 or in performing under the contract thereafter, and that such lack of due care had been a "substantial factor" in causing United's shortage and rendered United liable in damages. 610 F. Supp. at 1338, 1342-57. However, before trial

cessfully sought to remove the suit to federal court. *City of New Orleans, et al. v. United Gas Pipe Line Co.*, 390 F. Supp. 861 (E.D. La. 1974). United also twice moved to refer issues to the Commission for exercise of its primary jurisdiction in the curtailment proceedings—proceedings in which United, LP&L, and other parties to the lawsuit were participating—and to stay trial in the interim. The trial court rejected both motions,[7] and commenced a non-jury trial in January 1982. In August 1984, the court entered a judgment holding United liable for breach of its contracts and awarding LP&L $40.3 million in damages, plus prejudgment interest and costs. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, No. 579-040 (Civ. Dist. Ct., Parish of Orleans, La. Aug. 24, 1984). App. C at 77a.[8]

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on the amount of damages attributable to United's lack of due care, the parties settled and the court subsequently held that its memorandum on liability "should have no legal effect." *Texasgulf, Inc. v. United Gas Pipe Line Co.*, 617 F. Supp. 41 (D.D.C. 1985).

[7] *City of New Orleans, et al. v. United Gas Pipe Line Company*, Nos. 575-544, *et al.* (Civ. Dist. Ct., Parish of Orleans, La., orders entered June 26, 1979 and October 23, 1981). The court rejected the motions notwithstanding the fact that the Fifth Circuit earlier had affirmed the Commission's primary jurisdiction over several issues raised in another curtailment damage suit against United—including the causes of United's shortage and the effect of United's tariff upon its alleged liability for curtailments—and had approved referral of the issues and stay of trial in the interim. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977). Pursuant to this Fifth Circuit decision, all federal district courts in which curtailment damage suits against United were pending—but not the Louisiana trial court—stayed trial and referred issues to the Commission, which accepted several of them for determination. *See United Gas Pipe Line Co.*, 4 F.E.R.C. (CCH) ¶61,151 at 61,354 (1978).

[8] In its suit, LP&L had also claimed that United was liable because the curtailments constituted a bad faith breach of contract, a tortious violation of other duties allegedly owed LP&L, and a violation of the antitrust laws of Louisiana. The trial court dismissed LP&L's antitrust claims at the close of the plaintiffs' consolidated case (Civ. Dist. Ct., Parish of Orleans, La., order entered March 31, 1983), and on appeal this order was affirmed by the Louisiana Court of Appeal. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 518 So.2d 1050 (La. App. 4th Cir. 1987), *writ denied*, 523 So.2d 232 (La. 1988). The trial

The trial court ruled that the sole issue presented was whether United's curtailments breached its contractual delivery obligation. App. C at 84a. It concluded that the curtailments constituted a failure to perform the obligation and that neither the contracts specifically, nor Louisiana law generally, excused United's nonperformance. *Id.* at 86a-91a. The trial court also ruled that it did not have to await the Commission's determination on whether United's tariffs or Commission orders precluded or limited the imposition of liability since (in the court's view) under Louisiana law no tariff or order could excuse United's nonperformance because "United's shortage of supply was induced by the unrealized expectations and imprudent decisions of United and its management." *Id.* at 94a-95a.[9]

On appeal, the Louisiana Court of Appeal upheld United's liability, increased the principal sum of damages to approximately $90 million, and awarded approximately $90 million in additional prejudgment interest. App. A at 75a. The court repeatedly emphasized that United's liability derived from contract, *i.e.*, that United had failed to perform its contractual obligations, both express and implied, and that LP&L's damages were the result "of the breach of duties arising exclusively from contracts." *Id.* at 8a-10a, 40a. Although the court issued its decision after Commission Opinion No. 237 was entered (but before the Fifth Circuit's affirmance of that opinion), the decision never referred to the Commission's opinion and contained only the following passing reference to "negligence:"

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court subsequently rejected LP&L's claims that United had breached its contracts in bad faith and was liable to LP&L in tort (App. C at 95a) and these holdings were affirmed by the Louisiana Court of Appeal. App. A at 4a, 39a-41a, 70a-71a.

[9] The court never found United to have been negligent, *see* n. 13, *infra*, never identified the standard for determining whether United's decisions were "imprudent," never considered the effect of Commission orders or policies that approved or influenced such decisions, never addressed the question whether United's "expectations" were unreasonable as opposed to "unrealized," and never acknowledged the industrywide shortage of natural gas or compared United's experience to that of other pipelines.

> These cases [federal decisions issued prior to Opinion No. 237] support the view that, notwithstanding that federal orders or tariffs may override any state law liability akin to strict liability or liability without fault, breaches of contract not only by willful misconduct, but also by negligence or lack of due diligence, are governed by state law standards. This defense [based upon federal curtailment orders and tariffs] seems to be no more than a restatement of the "duly constituted authorities" clause defense discussed earlier, and we deem it equally insufficient to avoid United's liability.

App. A at 18a.

In short, the court concluded that federal curtailment orders or tariffs were relevant to United's liability only as a state law "defense" to a breach of contract claim, and the court rejected this defense on two related state law grounds. The first was that the curtailment orders had not caused United's shortage but had merely allocated an existing shortfall, and accordingly that United had not proved that these orders were "the cause of United's failure to meet its contractual delivery obligations to its customers, including LP&L . . . ."[10] The second was that

[10] App. A at 17a. In determining the relevance of Commission curtailment orders, the court erred factually as well as legally. United's tariff (and its contracts with LP&L) had contained a "power plant preference" that, in times of shortage, placed a substantial portion of LP&L's fuel requirements above those of other customers. *See* App. A at 20a-21a. In a 1973 curtailment order, the Commission invalidated this "power plant preference," thereby immediately requiring United to redirect significant amounts of gas to other customers that otherwise would have been delivered to LP&L. *United Gas Pipe Line Co.*, 49 F.P.C. 179 (1973). While this order was subsequently vacated and remanded on other grounds, *State of Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974), the "power plant preference" was never reinstated. According to United's undisputed evidence, LP&L's damages for alternative fuel would have been less by $41.5 million plus interest—in total almost $90 million—had the Commission not required that United's available gas be reallocated to other customers. R. United Ex. 774.

United's actions had caused its shortage because the "actions, however reasonable in other contexts, were not reasonable in the context of firm requirements contracts, because they did not constitute a reasonable effort to perform those contracts, *especially in their implied obligations to have and maintain, or to acquire, at whatever cost, the gas necessary to fulfill the explicit delivery obligations.*" App. A at 8a-9a (emphasis added).

United lodged the Louisiana Court of Appeal decision with the Fifth Circuit during the appeal of Opinion No. 237, asserting that the decision demonstrated why a standard of liability greater than negligence was required. The Fifth Circuit, however, concluded that a higher standard of liability was unnecessary because the federal negligence standard, viewed as one of substance, not labels, adequately protected federal interests. *See* pp. 6-7, *supra*.

The Fifth Circuit also took specific note of the infirmities of the Louisiana Court of Appeal decision:

> While we recognize that United may have legitimate concerns about the state court's treatment of federal preemption, burden of proof and breach of good faith duty to provide gas "whatever the cost," we have no basis for concluding other than that the Louisiana Supreme Court will enforce the federal standard and we express no opinion about the case.

App. G at 181a-182a, n. 15. These comments notwithstanding, the Louisiana Court of Appeal rejected United's subsequent petition for rehearing without opinion, App. B at 76a, and the Louisiana Supreme Court likewise denied United's application for a writ of certiorari without opinion. App. D at 114a.[11]

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[11] On April 6, 1988, the Supreme Court of Louisiana stayed execution of the judgment pending the timely filing and disposition of a petition for a writ of certiorari with this Court. No. 88-C-0406 (La. April 6, 1988).

REASONS FOR GRANTING THE WRIT

Sixteen years ago this Court decided *LP&L I, supra*, holding that the Commission could order pipelines to curtail deliveries of natural gas to particular customers—whether or not such deliveries were otherwise required by contract—to assure uniform and equitable distribution in a time of national shortage. The issues in the present case arise out of the Commission's efforts to resolve a second, closely-related question: whether customers unable to obtain their full contractual deliveries could recover damages for any shortfall. The Commission, in proceedings to which both United and LP&L were parties, concluded that they could not, unless United actually caused the shortage through its negligence or greater misconduct. The Fifth Circuit affirmed that decision, noting that the Commission had established a federal standard with specific content and that state courts—including specifically the courts below—were obliged to follow it.

The courts below, however, did no such thing. In upholding the largest judgment ever rendered in the Louisiana courts, the courts below steadfastly adhered to their own view of contract-based liability and refused, without explanation, to determine whether United had been negligent or worse. Whatever the reasons for this indifference, it was error on at least two important grounds. First, in failing to follow the decision of the Fifth Circuit, which construed and affirmed the Commission's order, the Louisiana courts flouted the exclusive review power granted to federal courts of appeals under the NGA. *See* 15 U.S.C. §717r (1982); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). Second, even leaving aside the affirmance by the Fifth Circuit, the state courts did not give necessary weight to the *Commission's* order, which unmistakably preempted all contractual liability absent a determination of negligence. *See, e.g., City of New York v. Federal Communications Commission*, 108 S. Ct. 1637 (1988).

The result of the proceedings below has thus been to place United in an impossible position. On the one hand,

in a Commission order upheld by the Fifth Circuit, United was to have been protected by a federal standard of liability that requires proof of negligence as a pre-condition to recovering damages; on the other, in a judgment entered in and affirmed by the Louisiana courts, United has been subjected to a nearly $200 million judgment rendered without regard to the federal standard. This disregard of federal law, and of the regulatory scheme enacted in the NGA, can be corrected only by this Court.

I. THIS COURT SHOULD GRANT CERTIORARI TO PROTECT THE INTEGRITY OF EXCLUSIVE STATUTORY PROCEDURES FOR REVIEW OF FEDERAL AGENCY ACTION AND TO ENSURE COMPLIANCE WITH FINAL AGENCY ACTION.

This case, first of all, raises a central issue regarding the authority of federal courts of appeals to render decisions, on direct review of agency orders, that are binding on state courts. The NGA provides that "aggrieved" parties "may obtain a review of [a Commission] order in [a] court of appeals of the United States . . . ." 15 U.S.C. §717r (1982). The statute sets out procedural and substantive requirements governing such appeals, and makes clear that "[t]he judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, *shall be final,* subject to review by the Supreme Court of the United States . . . ." *Id.* (emphasis added).[12] As noted earlier, the Commission order at issue in this case was affirmed by the Fifth Circuit, and no further review was sought.

The finality of these NGA proceedings has been directly undercut by the proceedings below. In affirming the Commission order, the Fifth Circuit acknowledged that United

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[12] The provisions for appellate review under the NGA are characteristic of those used by Congress in regulatory programs that it establishes. *See generally* 28 U.S.C. §2341, *et seq.* (1982). Accordingly, this case has importance across the spectrum of the federal administrative process.

had "legitimate concerns" about the Louisiana courts' failure, up to that time, to honor the standard established by the Commission. Nevertheless, it rejected those concerns as a reason for requiring the Commission to adopt an even higher standard, saying that it saw "no basis for concluding other than that the Louisiana Supreme Court will enforce the federal standard." App. G at 181a-182a, n. 15. That conclusion, however, soon proved to be illusory. Shortly thereafter, the Louisiana Court of Appeal and the Louisiana Supreme Court denied all further petitions for review.

The effect of these actions is to leave in place a decision that conflicts with that of the Fifth Circuit in several crucial respects. To begin with, the Louisiana court never measured United's behavior in terms of what a reasonably prudent pipeline would have done under the same or similar circumstances. Instead, the court held that whether United's actions were "reasonable" had to be determined "in the context of firm requirements contracts" and specifically in the context of "implied obligations," read into the contracts by the court, "to have and maintain, or to acquire, at whatever cost, the gas necessary to fulfill the explicit delivery obligations." App. A at 8a-9a. Moreover, at no time did the court impose on LP&L the burden of proving negligence;[13] nor did it ever inquire, much less decide, whether United "with reasonable efforts could . . . have foreseen and avoided" the shortage. App. G at 182a.[14]

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[13] While it once mentioned the term "negligence," *see* pp. 9-10, *supra*, the Louisiana Court of Appeal never assessed United's behavior in accordance with the requisite elements of negligence and repeatedly emphasized that United retained the burden of proving that it had acted without fault of any kind. App. A at 4a-5a. Indeed, the trial court specifically struck language stating that United had been "negligent" in causing the shortage from the proposed post-trial findings and conclusions submitted by LP&L and other parties.

[14] Ironically, the Louisiana Supreme Court, in a 1978 decision involving an intrastate pipeline, stated that "[t]o charge the company with foresight of the present national energy shortage in the 1960's would set a standard of acuity that could be met by very few, if any,

Finally, having failed to make these initial determinations, the Louisiana court was in no position to make the dependent finding that negligence in the face of a foreseeable shortage was the "proximate cause" of LP&L's claimed injury.[15]

The refusal by the Louisiana courts to apply the Fifth Circuit's ruling is in open disregard of the scheme established by Congress under the NGA. That Act commits appellate review of Commission orders "exclusive[ly]" to the federal courts of appeals and further provides that the decisions of such courts "shall be final" subject only to review by this Court. 15 U.S.C. §717r (1982). This Court has held that this judicial review provision means just what it says and that the decisions of federal courts of appeals are not open to collateral attack. *City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958) (construing the judicial review procedures of the Federal Power Act, 16 U.S.C. §825 l(b) (1982), which are identical to those of the NGA). *See also Port of Boston Marine Terminal Association v. Rederiaktiebolaget Trans Atlantic,* 400 U.S. 62, 72 (1970) (where an agency decision has become final "neither the District Court nor any Court of Appeals nor this Court had or has authority to review the merits of that decision").

The NGA thus does not permit the Louisiana courts to ignore requirements of a Commission order set forth by the Fifth Circuit on direct review of that order.[16] Whether

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in the natural gas industry . . . ." *Sugar Bowl Gas Co. v. Louisiana Public Service Commission,* 354 So.2d 1014, 1021 (La. 1978).

[15] Indeed, despite the facts that virtually all pipelines suffered significant gas shortages in the 1970's and that substantial curtailment of gas deliveries to LP&L resulted directly from a Commission order invalidating a curtailment preference for LP&L that had been in United's tariff, *see* n. 10, *supra,* the Louisiana courts held United liable for every cubic foot of gas that LP&L failed to receive.

[16] The specific requirements of the federal standard elucidated by the Fifth Circuit regarding burden of proof, an objective test of reasonableness, including foreseeability, and a showing of proximate cause, are clearly part of the court's holding and cannot properly be called "dicta"

or not the state courts agree with the Fifth Circuit's construction of the order, the fact remains that the construction binds the courts in any litigation wherein the same parties attempt to contest the order's scope or its preemptive effect. If a party believed that the Fifth Circuit had misconstrued the Commission order—or had affirmed it on an improper basis—the appropriate course of relief, also provided for by Congress, was to seek rehearing in the federal appeals court or to petition for review in this Court. *See, e.g., Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952). What a party cannot do, however, is what LP&L and its Louisiana governmental allies did in this case: urge a potentially more sympathetic state court to substitute its own views for those of the federal reviewing court.[17] Congress can hardly have intended to give the federal courts exclusive jurisdiction to review an agency's orders and yet allow other courts to interpret them as they see fit, especially where inconsistent interpretations undermine the federal interests protected by the agency's determination.

It is important to note in this regard that, unlike LP&L, the Commission did not believe that the Fifth Circuit misconstrued its order. The Commission not only declined to

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as LP&L suggested in the courts below. The articulation of the requirements was in direct response to United's claim that the Commission's adoption of an unspecified negligence test, without more, would be arbitrary and capricious. In rejecting this claim, and in affirming the Commission's order, the Fifth Circuit expressly relied on its construction of the underlying order as inherently embodying these requirements through adoption of the "negligence" standard.

[17] In its brief to the Louisiana Supreme Court opposing United's application for a writ of certiorari to review the Louisiana Court of Appeal judgment, LP&L denominated one of its arguments "This Court is Not Bound By The Fifth Circuit Opinion" and argued that "Louisiana courts have held that although decisions of the United States Supreme Court construing federal statutes are binding on state courts, the decisions of federal district courts and courts of appeal are not binding." "Louisiana Power & Light Company's Brief in Opposition to Application for Writ of Certiorari or Review by United Gas Pipe Line Company" at 8, *Louisiana Power & Light Company v. United Gas Pipe Line Company, et al.*, No. 88-C-0406 (La. Sup. Ct., filed Feb. 18, 1988).

seek further review but subsequently urged adoption of the Fifth Circuit's decision in an appeal to the United States Court of Appeals for the District of Columbia Circuit from an order involving another pipeline's liability for curtailments. The D.C. Circuit agreed, adopting "as our own the well-reasoned position set forth in *United Gas Pipe Line Co. v. FERC,* 824 F.2d 417, 425-30 (5th Cir. 1987)".[18] Accordingly, as matters now stand, United is faced with a bizarre situation in which the *Commission* considers the Fifth Circuit's decision to be binding, but the Louisiana courts apparently do not.

If the power of reviewing courts stops short of giving a binding construction to an agency order on direct review, that is a rule that should be announced directly by this Court, not adopted *sub silentio* by the Louisiana courts. On the other hand, if state courts are bound by the terms of a federal court of appeals' affirmance of an agency order, then the judgment below is a direct affront to that principle. Either way, review by this Court is appropriate.

II. THIS COURT SHOULD GRANT CERTIORARI TO PROTECT THE FEDERAL INTERESTS IN THE REGULATION OF INTERSTATE PIPELINES THAT ARE UNDERMINED BY THE LOUISIANA JUDGMENT.

Even if the Fifth Circuit's decision in *United v. FERC* were not binding on the Louisiana courts, the decision below is inconsistent with the *Commission's* order and cannot stand. The Louisiana decision based United's liability upon preempted state contract standards and failed to apply the federal liability standard, thereby jeopardizing the federal interests protected by that standard.

This Court has frequently made clear that, under the Supremacy Clause, state law must give way in the face of paramount federal law. *See, e.g., Schneidewind v. ANR*

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[18] *Transcontinental Gas Pipe Line Corp. v. FERC,* No. 86-1358 (D.C. Cir., order entered Feb. 16, 1988), *reh'g granted in part and denied in part* (April 22, 1988).

Pipeline Co., 108 S. Ct. 1145, 1150 (1988); *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 152-54 (1982). Although Congress often preempts state law by statute, the Court "ha[s] also recognized that 'a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation' and hence render unenforceable state or local laws that are not otherwise inconsistent with federal law." *City of New York v. Federal Communications Commission*, 108 S. Ct. 1637, 1642 (1988), (citing *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 369 (1986)); *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700-05 (1984); *United States v. Shimer*, 367 U.S. 374, 383 (1961). Here, the judgment of the Louisiana Court of Appeal not only is directly contrary to a valid agency order but undermines important federal interests in the uniform and effective regulation of natural gas pipelines.

A. The Federal Standard and Federal Interests.

This Court's decision in *LP&L I, supra*, dealt with only one part of the threat to federal interests posed by state regulation of curtailments. *LP&L I* affirmed the Commission's plenary authority to regulate curtailments in the public interest irrespective of contract and free from suits for injunctive relief. However, United and other pipelines, having made deliveries according to the priorities established by the Commission, were still faced after *LP&L I* with suits for damages based upon the failure to provide the gas called for in individual contracts.

In Commission proceedings that addressed United's potential liability, the Commission held that, at a minimum, liability had to be based upon a judicial "determination of whether United's management's actions or inactions concerning its shortages meet the elements of common-law negligence . . . ." App. E at 127a. In so holding, the Commission expressly refused to adopt the view "that contract entitlements are sacrosanct and should govern curtailment allocations." *Id.* at 131a. To the contrary, the Commission concluded that back-door enforcement of private contracts

through claims for damages would be against the public interest, finding that it would be "unduly preferential" if customers could obtain "contract damages for the monetary equivalent of the shortages, irrespective of [United's] culpability." *Id.* The Commission pointed out that "[a]wards under such circumstances would either directly (by being passed on through rate increases) or indirectly (through weakening the pipeline's financial condition) adversely affect the remaining customers of United." *Id.* [19]

The balance between federal and state interests struck by the Commission[20] plainly recognizes that liability for "negligence" and liability for breach of contract are two different things. If a state court could impose liability by calling a pipeline "negligent" simply because it did not accumulate a supply of gas equal to its total contractual obligations, the court would effectively be doing just what the Commission intended to prohibit: granting preferences to some customers, and harming other customers, through the award of contract-based damages. Thus, the Fifth Circuit, noting that the term "negligence" is "plastic in the hands of some courts," spelled out the "elements of common-law negligence" adverted to by the Commission: burden of proof, a test of "objective reasonableness," foreseeability, and proximate cause—and emphasized how such a standard differs from preempted contract standards. *See* discussion *supra,* pp. 6-7.

The standard adopted by the Commission also assures that the actions of a pipeline are assessed in the proper

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[19] This Court has concluded that damage actions under state law can adversely affect federal interests just as easily as can claims for injunctive relief. *See, e.g., San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959) (prohibited state "regulation can be as effectively exerted through award of damages as through some form of preventive relief").

[20] The determination that a minimum federal standard of liability must be applied in state damage actions as a means of accommodating federal and state interests is consistent with the approach this Court adopted in *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966), and *Old Dominion Branch No. 496 v. Austin,* 418 U.S. 264, 279 (1974).

regulatory context. United's curtailments to LP&L and other customers were not an isolated phenomenon; they arose out of a nationwide shortage of natural gas that affected virtually every major pipeline and that, as this Court and other courts have recognized, was caused at least in part by federal regulatory policies. *See* pp. 3-4, *supra*. Moreover, disputes over the reasons for a particular pipeline's lack of adequate supply necessarily implicate that pipeline's purchasing practices, an area central to the Commission's NGA jurisdiction.[21] Under the NGA pipelines are not charged solely to have gas available for customers; they are required to manage gas supplies economically and efficiently in order to provide gas at the lowest reasonable cost.[22] The negligence standard adopted by the Commission properly recognizes that any assessment of liability must accord due regard to industry norms and to these interdependent regulatory concerns.[23]

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[21] This Court has held that the gas purchasing practices of pipelines are within the Commission's exclusive jurisdiction. *See Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 474 U.S. 409 (1986); *Northern Natural Gas Co. v. State Corporation Commission*, 372 U.S. 84 (1963).

[22] *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 380 (1959); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944); *Midwestern Gas Transmission Co.*, 36 FPC 61, 70 (1966), *aff'd*, *Midwestern Gas Transmission Co. v. FPC*, 388 F.2d 444 (7th Cir.), *cert. denied*, 392 U.S. 928 (1968).

[23] In an earlier curtailment order holding that United should be exonerated from liability unless it were "shown that the pipeline's need to curtail resulted from its own negligence, bad faith, or other wrongful conduct," the Commission observed:

> Furthermore, attacks upon a pipeline's gas procurement activities must recognize that (a) gas availability of an interstate pipeline is determined in large measure by government policies, producer decisions concerning exploratory and developmental drilling activity and state conservation orders, and (b) that jurisdictional producer prices are prescribed by the Federal Power Commission; neither are controlled solely by independent pipeline decisions. Recognition must also be given to prior certificate authorizations by this Commission, so that no new or expanded sales occur independently of

B. The Liability Standards Applied by the Louisiana Courts.

In holding United liable in damages for its curtailments, the Louisiana courts simply went off in a different direction. Regarding the case largely as a private contractual dispute to be decided according to state law standards, the Louisiana Court of Appeal placed the burden of proof on United to establish that its conduct was proper; never analyzed how a reasonably prudent pipeline would have acted under similar circumstances; never determined when a shortage necessitating curtailments on United's system was reasonably foreseeable; and never made the requisite finding of proximate cause. *See* discussion, *supra*, pp. 14-15.

The failure to apply the basic federal standard—bad enough in itself—was made even worse by the standard that the state court *did* apply. The heart of the court's decision was its conclusion that United wrongfully neglected its "implied [contractual] obligations to have and maintain, or to acquire, *at whatever cost*, the gas necessary to fulfill the explicit delivery obligations."[24] This basis for liability undercuts federal interests in several distinct, though related, ways.

> our jurisdiction and only then after hearings and appropriate findings of fact and conclusions of law.

United Gas Pipe Line Co., 49 F.P.C. 1211, 1220 (1973).

[24] App. A at 8a-9a (emphasis added). This emphasis on the irrelevance of cost is repeated throughout the decision. For example, with respect to United's negotiations with producers in the early 1960's that, in some instances, resulted in the release of reserves, the Louisiana Court of Appeal found that

> United does show that take-or-pay costs and other considerations prompted its business decisions, but increased costs to perform do not excuse nonperformance of contracts.

App. A at 11a. Similarly, the court also found that United did not perform its contracts in good faith because it took certain actions "for business reasons aimed not at performance of its contracts but at saving costs . . . ." *Id.* at 15a.

First, and most evidently, applying this standard is simply another way of holding United strictly liable for breach of contract. Except when gas is unavailable at any cost, it may be theoretically possible for a pipeline to store up gas supplies to meet all of its future delivery requirements, but that possibility says little about whether it was negligent for the pipeline not to do so. As the Fifth Circuit noted, "defining the pipeline's duty of care as derived from the contract obligations and defining the breach of duty as negligent failure to perform is indistinguishable from the preempted contract standard . . . ." App. G at 183a.

Second, while concluding that United's obligation was to acquire gas "at whatever cost," the Louisiana court made no attempt to measure that supposed duty against the practices of a reasonably prudent pipeline. That inquiry, in turn, would have required the court to determine whether various decisions to release reserves, or not to acquire additional reserves, were made at a time when a future shortage of natural gas was reasonably foreseeable. As the Fifth Circuit observed, "[i]f the need for curtailment was not reasonably foreseeable, imposition of liability for curtailments does little to encourage prudent management." *Id.* at 183a. Yet, in the proceedings below, the Louisiana court was particularly critical of United's decision to release gas reserves *in 1962*—almost a decade before its shortages began. App. A at 9a. But if that conduct did not depart from the conduct expected of a reasonably prudent pipeline at that time, then it cannot be deemed negligent solely by reference to a later need to curtail in a time of unexpected shortage.

Third, the emphasis on maintaining gas supplies "at whatever cost" is totally foreign to the regulatory environment in which pipelines long have operated and continue to operate. While the acquisition of costly supplies as an insurance policy for uninterrupted service to Louisiana customers may be of paramount importance to the Louisiana courts, the NGA and the Commission do not

take so rigid a view.[25] To the contrary, as previously noted, they require pipelines to maintain inventories at a cost and at a level that permits adequate service to gas consumers at the lowest reasonable cost. *See* n. 22, *supra*. Indeed, the Commission has found pipelines to be "imprudent" when they have bound themselves to high-priced supply contracts that unduly increase costs to customers.[26]

As this Court has often acknowledged, the service performed by a pipeline under Commission certificate is premised on a federal obligation to render service distinct from the pipeline's contractual arrangements with its customers. *California v. Southland Royalty Co.*, 436 U.S. 519, 526 (1978); *Sunray Mid-Continental Oil Co. v. Federal Power Commission*, 364 U.S. 137, 152-53 (1959). A determination that a regulated pipeline has been negligent cannot be made without regard to this federal obligation. The kind of actions for which the Louisiana courts have imposed liability are precisely the kind of actions that the Commission regulates or oversees under the Act: how much gas the pipeline should have acquired and when; how much it should have paid; whether and under what circumstances it reasonably should have reduced the amount of reserves it had under contract; and whether and when it should have added new service obligations or expanded existing ones. In fact, some actions criticized by the Louisiana

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[25] For example, in its landmark 1965 decision in the *Permian Basin Area Rate* proceeding, the Commission stated:

> There is considerable doubt that it is desirable, from the point of view of the public or the industry, to require or encourage a high level of proven reserves many years in advance of their probable use. It is an extremely costly matter to find and hold reserves beyond those which are needed to assure ample supplies to consumers.

Permian Basin Area Rate Proceeding, Opinion No. 468, 34 F.P.C. 159, 184 (1965). The Commission's order was ultimately sustained by this Court in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

[26] *See, e.g., Columbia Gas Transmission Corp.*, 42 F.E.R.C. (CCH) ¶61,021 (Jan. 19, 1988).

courts, and used as a basis for imposing liability, were actions specifically approved by the Commission.[27]

The contract-based standards applied by the Louisiana Court of Appeal disregarded this interplay between private contracts and federal regulation. Indeed, the court found that United's actions may well have been "reasonable in other contexts," but "were not reasonable in the context of firm requirements contracts . . . ." App. A at 8a-9a. But it is not for state courts, mandated by federal law to apply a standard of negligence, to establish their own unique priorities for regulated pipelines; they must take the regulatory environment as they find it, and determine whether, in light of all the objectives to be served, a particular pipeline departed from reasonable and accepted practice. *Cf. Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26 (1981). The Louisiana courts demonstrably failed to do this.

It is also significant that the Louisiana Court of Appeal gave no weight to a specific Commission order—one eliminating the "power plant preference" *(see* n. 10, *supra)*—that prevented United from complying with priorities established in its contract with LP&L. While not disputing that absent the order United could have greatly increased its deliveries to LP&L, the court reasoned that the initial failure to acquire adequate supplies was enough to make United liable for all shortfalls in delivery, regardless of intervening Commission orders. App. A at 21a. But this theory turns the contract into a one-way street, giving

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[27] For example, most of the "additional sales" and some of the "released reserves" criticized by the Louisiana Court of Appeal, App. A at 15a, were authorized by the Commission. The Fifth Circuit strongly suggested that such regulatory approval would, as a matter of law, bar state courts from imposing liability for those actions, stating that: "to the extent United is concerned that some of its actions taken under Commission supervision and determined to be in the public interest may become the basis of liability when evaluated by a court or jury, United is already protected under case law." App. G at 184a, (citing *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981)).

LP&L a contractual right to damages for shortfalls in delivery, even though the Commission denied United its right under the same contract to give LP&L priority in delivery that would have reduced United's liability to LP&L. The effect is hardly inconsequential: because of its inability to deliver in accordance with the power plant preference, United's liability to LP&L was increased by nearly $90 million.[28]

The approach followed by the Louisiana court is thus clearly at odds with important federal policies. As this Court pointed out in *LP&L I, supra*, 406 U.S. at 633-34, there are natural, and seemingly unavoidable, tensions between national and local interests when natural resources are scarce. These conflicts do not vanish once the immediate decision regarding allocation of existing supply has been made. Demands by customers for damages, enforced by state courts, can interfere with the federal curtailment scheme just as demands for specific performance.

Nor are such conflicts solely of historical interest. For example, the Commission is currently encouraging pipelines to release surplus gas as part of the Commission's effort to create a competitive nationwide market for natural gas at market prices.[29] In this regard, the Commission

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[28] Thus, even if United were to be held liable for some portion of the non-delivery to LP&L, it cannot, consistently with principles of federal preemption, be held liable for non-delivery caused by direct prohibitions in a Commission order.

[29] *See, e.g.*, Order No. 500, F.E.R.C. Statutes and Regulations (CCH) ¶30,761 (1987), *appeal pending sub nom. American Gas Association v. FERC*, Nos. 87-1588, *et al.* (D.C. Cir.); *Notice of Issuance of Proposed Policy Statement and Opportunity for Public Comments*, 38 F.E.R.C. (CCH) ¶61,230 (1987); Order No. 436, F.E.R.C. Statutes and Regulations (CCH) ¶30,665 (1985), *vacated and remanded sub nom. Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1468 (1988).

recently emphasized its intent, and that of Congress under the Natural Gas Policy Act, 15 U.S.C. §3301, *et seq.* (1982), to permit pipelines (or other purchasers of gas) to abandon such purchases under expired, terminated or modified gas purchase contracts whenever they "conclude that it is no longer economically efficient to continue ... [such] purchases ...."[30] The Louisiana judgment, in holding that a pipeline risks liability by failing to hoard supplies, cuts directly against this federal policy.

The Louisiana decision could also make it more difficult for the Commission to effectuate curtailment orders in the future. The lesson taught by the Louisiana courts in this case is that pipelines depart from their contracts, even pursuant to federal curtailment orders, at their peril. If the decision below is left intact, Commission efforts in the future to allocate scarce supplies according to the public interest, and irrespective of contract, would subsequently present the Commission with the choice of having pipelines or their customers bear the cost of substantial damage awards. At the same time, the approach adopted by the Louisiana courts will frustrate federal policy by "creat[ing] incentives for the pipelines to resist a federal curtailment scheme." App. G at 178a-179a.

The simple fact is that interstate pipelines cannot serve two masters. Nor can the Commission be at war with various state bodies or courts, either in exercising its regulatory responsibilities under the NGA or in determining how such exercise affects the enforcement of private contract rights. As it did sixteen years ago with respect to LP&L's action to enjoin United's curtailments, this Court should review LP&L's thus far successful action to obtain damages arising out of those same curtailments. In both cases, a state's interest in contract enforcement conflicts with—and must yield to—paramount federal interests.

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[30] Order No. 490, *Abandonment of Sales and Purchases of Natural Gas Under Expired, Terminated, or Modified Contracts*, F.E.R.C. Statutes and Regulations (CCH) ¶30,797 at 31,026 (1988), *reh'g denied*, RM87-16-001 (July 22, 1988).

CONCLUSION

The petition for a writ of certiorari should be granted.

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